85-1073

No. 85-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BLUE BELL, INC.,

Petitioner,

vs.

FRANK WILHELM and HAROLD L. KOGUT.

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-1854

Frank E. Wilhelm, Karl F. Gatlin and Harold L. Kogut,

Appellees,

versus

Blue Bell, Inc.,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, United States District Judge. (C/A 82-0507).

Argued: June 4, 1985 Decided: Sept. 18,1985

Before PHILLIPS, CHAPMAN and WILKINSON, Circuit Judges.

W.T. Cranfill, Jr. (John O. Pollard; Blakeney, Alexander & Machen on brief) for Appellant; Samuel M. Millette; Ernest S. DeLaney, III (DeLaney, Millette & McKnight, P.A. on brief) for Appellee.

CHAPMAN, Circuit Judge:

Plaintiffs Frank Wilhelm, Karl Gatlin, and Harold Kogut brought this age discrimination suit against their former employer, Blue Bell, Inc., under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq. Plaintiffs Wilhelm and Gatlin alleged that Blue Bell had discharged them because of their ages and that their respective discharges were without just cause and in violation of an implied covenant of good faith and fair dealing. Plaintiff Kogut later intervened and alleged that Blue Bell had discharged him because of his age. The plaintiffs' state law claims were dismissed prior to trial.

The jury found that Blue Bell had discharged plaintiffs Wilhelm and Kogut because of their ages in violation of the ADEA, awarded them damages, and concluded that

Blue Bell's discrimination was "willful" within the meaning of §7(b) of the ADEA, 29 U.S.C. §626(b). The jury also found that plaintiff Gatlin had not filed his age claim with the Equal Employment Opportunity Commission within the applicable time period and accordingly awarded him no damages. In conformity with the jury's verdict the district court awarded Wilhelm and Kogut back pay, liquidated damages equal to the back pay amounts, reinstatement, attorneys' fees and costs. These orders were stayed pending appeal.

Blue Bell appeals claiming that the district court erred in denying its motions for judgment notwithstanding the verdict or a new trial and in instructing the jury on the issue of willfulness. We affirm the district court's denial of Blue Bell's motion for judgment notwithstanding the verdict but remand the case for a new trial on the issue

of damages under a proper willfulness instruction.

I

Blue Bell manufactures and markets outer wearing apparel. Its most common product lines are blue jeans and related sportswear bearing the "Wrangler" brand name. Plaintiffs Wilhelm and Kogut were both Field Sales Representatives in the Southeastern Region of Blue Bell's Wrangler Boyswear Division. Wilhelm was responsible for the western half of North Carolina[1] and Kogut was responsible for the southern half of Florida.

Wilhelm was fired on February 2, 1982. Wilhelm was forty-nine years old and had been employed by Blue Bell for eight and one-half years when he was fired. At trial, Blue Bell claimed that it fired Wilhelm

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[1]Prior to mid-1981 Wilhelm was responsible for forty-one counties in North Carolina that ran from the Tennessee border to Wilmington.

because he refused to make "line presentations" as instructed by his supervisor, William Wise, and because he essentially ceased working in January 1982 after finishing a one year probationary period. Specifically, the evidence reveals that Wilhelm had worked only thirty accounts since January 1, the lowest of any salesman in the region. Blue Bell also notes that Wilhelm's relative salesman efficiency was the lowest in the region and his total number of accounts developed was the lowest in the region. In addition, Wilhelm's own contact reports indicate that he had made only one line presentation the first week in January, only two the second week, and only four the third week instead of the twenty per week required. As a result, Wilhelm had the lowest bookings in the region.

Wilhelm presents an entirely different picture of his performance. According to

Wilhelm, as of January 29, 1982, he had secured four new accounts, was twenty-four percent ahead of his prior year's sales, was number one in the Southeastern Region in sales, and was number eleven out of eighty-five sales persons in the nation. Furthermore, Wilhelm notes that these figures do not even take into account sales for the last week in January. Wilhelm states that had he received credit for all of the sales he made, his actual percentage ahead of sales for the year before would have been thirty-four percent and his position nationally would have been number nine out of eighty-five.

Kogut was fired on May 16, 1983. Kogut was fifty-two years old and had been employed by Blue Bell for twelve years when he was fired. At trial, Blue Bell claimed that it fired Kogut and an under forty salesman named Randy Cloud because they both failed, after

specific counseling and warning, to fulfill the evaluation criteria imposed on all the Boyswear salesmen in the Southeastern Region as part of an intensive eight-week period of evaluation. Blue Bell replaced Kogut with a twenty-eight year old salesman.

Kogut also presents a different picture of his performance. According to Kogut, at the time he was fired he was number one in the six-man district in accomplishing percent of sales quota and was number two in the entire Southeastern Region in acquiring new accounts. Kogut's immediate supervisor during the evaluation period, District Manager Joe C. Glover, testified that as of May 19, 1983, Kogut was at seventy-eight percent of quota with approximately four and one-half months laft in the fiscal year. In addition, Kogut notes that Blue Bell fired him approximately one month after he gave deposition testimony unfavorable to Blue

Bell as part of the discovery proceedings in the Gatlin and Wilhelm lawsuit.

II

To establish discrimination in an age discrimination case, the plaintiff must prove by a preponderance of the evidence that "but for" the defendant's motive to discriminate against an older employee, he would not have been terminated. E.E.O.C. v. Western Electric Co., Inc., 713 F.2d 1011, 1014 (4th Cir. 1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). The plaintiff may meet this burden "under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue...." Lovelace, 681 F.2d at 239. Alternatively, the plaintiff may rely on the judicially created proof scheme for Title VII cases, see McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which has been adopted for application in ADEA litigation. See E.E.O.C. v. Western Electric Co., Inc., 713 F.2d at 1014; Fink v. Western Electric Co., Inc., 708 F.2d 909 (4th Cir. 1983); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

In this case it is undisputed that plaintiffs Wilhelm and Kogut were in the protected age bracket when Blue Bell fired them. Accordingly, the sole issue for trial was whether age was a determining factor in the discharge of each plaintiff. In Lovelace this court established that the dispositive motivational issue of whether the plaintiff was discharged because of his age can be proven without resort to the McDonnell Douglas format:

> Where -- as here, and ordinarily -- coverage and unfavorable action are not disputed, the dispositive and only issue is a difficult, but narrow, motivational one: whether the employee "was [discharged] because of his age." This may of course be proved under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue,...without resort to any special judicially created presumption or inferences related to the evidence.

681 F.2d at 239 (emphasis added)(quoting Loeb, 600 F.2d at 1017).

In Lovelace this court held that direct evidence of age discrimination is sufficient to overcome a motion for a directed verdict or judgment notwithstanding the verdict. There, this court stated that in ruling upon a sufficiency motion in an ADEA case:

> The first question is whether plaintiff's evidence may have carried the original production burden without need to invoke the McDonnell-Douglas presumption. This may have occurred, for example, through direct evidence of a stated purpose to disfavor because of age....If this is the judicial assessment, inquiry of course ceases, no further production burdens

> are put in play, and the motion can be denied.

681 F.2d at 240 (emphasis added)(citation omitted). Furthermore, in Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981), this court ruled that where the plaintiff in an ADEA case relies primarily upon direct evidence of a discriminatory motive by the employer, the case "'simply does not fit the mold of the McDonnell Douglas forumula,'" and the plaintiff has no need to prove independently that the defendant's articulated reasons for a discharge were "pretextual." Id. at 1113 & n.2 (quoting Loeb, 600 F.2d at 1018).

In considering the motion for judgment notwithstanding the verdict, the district court was required to view the evidence in the light most favorable to Wilhelm and Kogut and to draw all reasonable inferences in their favor. The district court could not weigh evidence or assess the credibility of

witnesses. 9 Wright & Miller, Federal Practice & Procedure §2524 at 543-45 (1971). The test for determining whether judgment notwithstanding the verdict should be entered is whether, viewing the evidence in the light most favorable to the appellee-plaintiff, there is substantial evidence in the record to support the jury's findings. Brady v. Allstate Insurance Co., 683 F.2d 86, 89 (4th Cir. 1982), cert. denied, 459 U.S. 1038 (1982); Miller's Mutual Insurance Association v. Southern Ry. Corp., 483 F.2d 1044 (4th Cir. 1973).

Unlike the motion for judgment notwithstanding the verdict, the district court may weigh evidence and assess credibility in ruling on a motion for a new trial. See Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-2 (4th Cir. 1980). Indeed, the district court had a duty to order a new trial if "this action [was] required in order

to prevent injustice." 11 Wright & Miller, Federal Practice & Procedure §2805 at 38 (1973). However, the grant or denial of a motion for a new trial is within the sound discretion of the district court and will not be disturbed absent a clear showing of some abuse of discretion. See Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984); United States v. Horton, 622 F.2d 144, 147 (5th Cir. 1980).

III

A

The first issue on appeal is whether the district court erred in denying Blue Bell's motions for judgment notwithstanding the verdict or a new trial. Blue Bell argues that the plaintiffs have failed to establish a prima facie case of age discrimination because the record conclusively shows that neither Wilhelm nor Kogut was subjected to any disparate treatment because of his age.

Blue Bell emphasizes that between 1977 and 1983 only two over-forty Boyswear salesmen in the Southeastern Region (plaintiffs Wilhelm and Kogut) were discharged. During the same period, however, four other under-forty salesmen were also discharged. Furthermore, Blue Bell maintains that it fired both Wilhelm and Kogut because they failed adequately to discharge their duties as measured by objective criteria. Blue Bell also argues that there is no substantial evidence to support the jury's findings that both Wilhelm and Kogut had successfully rebutted Blue Bell's legitimate, nondiscriminatory reasons for its employment decisions.

The plaintiffs introduced ample direct evidence suggesting that Blue Bell fired them because of their ages. This direct evidence of age discrimination consisted of testimony relating how various Blue Bell officials had indicated an intent to replace

older salesmen with younger salesmen. For example, plaintiffs introduced evidence of a conversation between Wilhelm and his immediate supervisor, William Wise, in February 1981, less than one year before Wilhelm's discharge, relating to various personnel changes in the company. Wilhelm testified that Wise told him that "eventually Blue Bell is going to have $15,000 a year college boys for salesmen....Blue Bell cannot stand these five and six percent commission rates; so, in time they will have all young college guys on a salary, being paid expenses and going around taking inventory in Blue Bell accounts." App. at 406.

The plaintiffs also introduced evidence of a conversation between Wilhelm and Wise in September 1981 when Wise placed Wilhelm on probation. At that time Wilhelm protested that his performance was better than the other salesmen in the Region and accused

Blue Bell of being "on a youth campaign" and wanting "to get rid of the older guys and replace them with younger people." App. at 423. Instead of denying that accusation, Wise confirmed that he believed that "older people tend to become complacent whereas younger people generally have more drive and ambition." Id. Wilhelm testified that Wise told him that "He was going to take care of him first and then there were going to be some others." Id.

Kogut testified that in September or October 1981 Wise conceded that he believed that "younger salesmen do a much better job than older salesmen." App. at 580. According to Kogut, Wise further stated that "in the not too distant future, all Wrangler salesmen would be young, college boys driving leased Chevrolets, taking inventory on big Wrangler accounts." Id. Kogut testified to these statements by Wise while he was a

Blue Bell employee and prior to becoming a plaintiff in this case.

Wilhelm and Kogut testified that they informed Jerry Poole, the president of the Boyswear Division of Blue Bell, about the statements made by Wise that younger salesmen do a much better job than older salesmen and that the future Blue Bell salesman would be a young college boy. According to Wilhelm and Kogut, in each instance Poole responded, "That really doesn't bother me too much." App. at 440, 776. At trial Poole admitted that Wilhelm and Kogut had informed him of Wise's age related remarks prior to their termination and that he had, in fact, responded to each that the statements did not bother him. App. at 776. Poole explained that these threats to terminate older salesmen and replace them with "college boys" did not bother him because he was not "going to let it happen." Id. Furthermore, the

uncontradicted evidence at trial established that when Poole was first informed that Wise had placed Wilhelm on probation in September 1981, five months prior to his firing, Poole responded, "you have to understand that Bill Wise is of the opinion that the younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around a while and run out of steam." App. at 579.

Wise ceased to be Kogut's manager and was replaced by Joe Glover. The plaintiffs offered evidence that in December 1981 Glover told Kogut, Wilhelm and another Blue Bell salesman that "Blue Bell doesn't want salesmen with good records anymore....They want young men who can do the work for a lot less money." App. at 445-46, 597-98. The plaintiffs further offered evidence that in December 1981, one month prior to Wilhelm's

firing, the National Sales Manager of Blue Bell, Ed Weymeth, approached Wilhelm, Kogut, and one other older salesman and said, "My God, [are] you old guys still around. I thought we got rid of you at the last sales meeting." App. at 596, 445.

We conclude that there is substantial evidence in the record to support the jury's findings that Blue Bell discharged Wilhelm and Kogut because of their ages. The plaintiffs introduced ample direct evidence of age discrimination from which the jury could have concluded that Blue Bell fired Wilhelm and Kogut because of their ages. This direct evidence of age discrimination, if believed by the jury, was sufficient by itself to support a verdict for the plaintiffs and, concomitantly, to survive a motion for a directed verdict or a judgment notwithstanding the verdict. Lovelace v. Sherwin-Williams Co., 681 F.2d at 240. In addition,

this direct evidence of age discrimination obviated the need for an independent showing by plaintiffs that Blue Bell's articulated reasons for their discharges were "pretextual." Spagnuolo v. Whirlpool Corp., 641 F.2d at 1113. Thus, the district court did not err in denying Blue Bell's motion for judgment notwithstanding the verdict. For the same reasons, the district court did not abuse its discretion in denying Blue Bell's motion for a new trial.

B

The second issue is whether the district court erred in instructing the jury on the issue of willfulness. Section 7(b) of the ADEA, 29 U.S.C. §626(b), provides that a prevailing plaintiff is entitled to double damages in the case of a "willful" violation of the ADEA. In this case the district court awarded the plaintiffs liquidated damages "based upon the jury verdict, and all the

evidence before the court" and because the "discriminatory actions of defendant towards [Wilhelm and Kogut] were willful and not effected in good faith."

Despite its failure to object at trial, Blue Bell argues that the district court erred in instructing the jury on the issue of willfulness. It claims that the instruction was inconsistent with the Supreme Court's recent decision in TransWorld Airways, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985), decided during the pendency of this appeal. We analyze the instruction in light of TransWorld. See United States v. The Schooner Peggy, 5 U.S. 1 (1 Cranch) 102 (1801); Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711-12 (1974).

In TransWorld the Supreme Court approved the Second Circuit's definition that a violation is willful if "'the employer either

knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 105 S.Ct. at 625 (quoting the Second Circuit below, 713 F.2d 940, 956 (2d Cir. 1983). This holding prevents an award of liquidated damages when a diligent employer, fully aware of the ADEA and pursuing a mistaken path to comply with it, acts reasonably and in good faith. 105 S.Ct. at 625 n.22, 626. The Supreme Court expressly rejected the argument that a violation of the ADEA is willful if the employer simply knew of the potential applicability of the Act:

> Even if the "in the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondents would result in an award of double damages in almost every case. As it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure

> of the statute show that Congress intended a two-tiered liability scheme.

Id. at 625 (footnote omitted).

In this case the district court initially instructed the jury as follows:

> If you find that the discharge of one of the plaintiffs was knowingly and intentionally done, with the knowledge that the transaction was subject to the Age Discrimination Act and that...it was intentionally done knowing what the consequences would be and that conduct was in violation of the law to the knowledge of the actor, then you would answer that issue yes. Otherwise, you would answer it no.

After its initial instructions, the district court gave counsel for both sides an opportunity outside the presence of the jury to object to the instructions or to propose additional instructions. Plaintiffs' counsel objected to the court's instruction that Blue Bell must have intentionally violated the law in order for its conduct to have been willful and proposed an additional instruction on that issue. The district court

then gave an additional two sentence instruction on the issue of willfulness:

> Conduct is willful when it is done intentionally, knowingly, with the intention to accomplish the result of firing and with awareness on the part of the actor that the conduct is covered by the Age Law. It doesn't quite go so far as to require that there be proof of an intentional act to violate the law but there does have to be a consciousness of the application of the law in order for it to be willful. (emphasis added).

The district court's second willfulness instruction is similar to the "in the picture" standard rejected in TransWorld. As the Supreme Court noted in TransWorld, this type of standard would result in an award of double damages in nearly every case. Thus, we reverse the district court's award of liquidated damages and remand the case for a new trial on the issue of damages under a willfulness instruction consistent with the Supreme Court's decision in TransWorld.

C

The third issue concerns various evidentiary rulings. Blue Bell contends the district court committed four separate evidentiary errors in (1) refusing to allow counsel for Blue Bell to cross-examine Kogut about whether there was a territory that encompassed the northern half of Florida, the southern part of Georgia, and the part of South Carolina including Charleston; (2) refusing to allow Blue Bell to introduce into evidence during the testimony of Joe Glover part of a chart which contained summaries of information from other Blue Bell records concerning the performance of salesmen in both the northern and southern districts; (3) admitting into evidence a letter written by William Holt, the president of Blue Bell's Maverick Division, to all retail distributors of Blue Bell's products; and (4) refusing to allow Blue Bell to introduce testimony and exhibits concerning the sales

performance of Wilhelm's twenty-four year old replacement, Wayne Knighton.

The admission or exclusion of evidence rests within the sound discretion of the district court and cannot be reversed absent abuse of that discretion. DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 518 (4th Cir. 1985); Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982). After carefully reviewing the record we are unable to conclude that the district court abused its discretion in this case.

IV

In summary, we affirm the district court's denial of Blue Bell's motion for judgment notwithstanding the verdict but remand the case for a new trial on the issue of damages under a proper willfulness instruction. On remand, the district court should instruct the jury on willfulness in conformity with the Supreme Court's recent

decision in TransWorld Airways, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985).

REMANDED.

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	
v.	)	ORDER
BLUE BELL, INC.,	)	
Defendant.	)	

Defendant on September 5, 1984, filed a motion for stay of judgment pending appeal from this court's orders of July 3, 1984. Plaintiffs' counsel has not opposed this motion.

The motion for a stay is GRANTED.

IT IS SO ORDERED, this the 11 day of October, 1984.

s/
James B. McMillan
United States District Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT, Plaintiffs,	)	
v.	)	FINAL JUDGMENT
BLUE BELL, INC., Defendant.	)	

This case was tried before a jury beginning on February 27, 1984, and on March 5, 1984, the jury returned verdicts as follows:

As to the plaintiff Frank E. Wilhelm:

1. Did defendant discharge plaintiff because of his age, in violation of the Age Discrimination in Employment Act?

ANSWER: Yes.

2. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $108,300

3. If so, was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

As to the plaintiff Karl F. Gatlin:

1. Did defendant Blue Bell fail to post and keep posted in conspicuous places on its premises notices approved by the Secretary of Labor advising employees of their rights under the Age Discrimination in Employment Act?

ANSWER: No.

2. Did the plaintiff file a charge of age discrimination within 180 days of the time he retained a lawyer or obtained actual knowledge of his rights under the Age Discrimination in Employment Act?

ANSWER: No

3. Did defendant discharge plaintiff because of his age in violation of the Age Discrimination in Employment Act?

ANSWER: Yes

4. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $ 0

5. If so , was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

As to the plaintiff Harold L. Kogut:

1. Did defendant discharge plaintiff because of his age, in violation of the Age Discrimination in Employment Act?

ANSWER: Yes

2. Did defendant discharge plaintiff because plaintiff gave a deposition in the age discrimination suits of Wilhelm and Gatlin?

ANSWER: Yes

3. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $55,660

4. If so, was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

Claims for equitable relief were tried to the court simultaneously. With this judgment the court is entering an order granting equitable relief and an order allowing attorneys' fees.

On the basis of the foregoing, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That plaintiff Gatlin shall have and recover nothing of defendant.

2. That plaintiff Frank E. Wilhelm shall have and recover of defendant the sum of $108,300.00 for the loss of earnings up to the time of the verdict of the jury.

3. That plaintiff Wilhelm shall have and recover of defendant an additional amount of $108,300 as liquidated damages.

4. That defendant shall reinstate plaintiff Wilhelm as a salesman in the Boys Wear Division of the southeast region, having the same western North Carolina territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time he was unlawfully discharged.

5. That defendant shall provide plaintiff Wilhelm with all the rights and benefits, including pension and profit sharing

benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

6. That from the date of the verdict of the jury until such time as plaintiff Wilhelm is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases ansd bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

7. That plaintiff Harold Kogut shall have and recover of defendant the sum of $55,660.00 for the loss of earnings up to the time of the verdict of the jury.

8. That plaintiff Kogut shall have and recover of defendant an additional amount of $55,660.00 as liquidated damages.

9. That defendant shall reinstate plaintiff Kogut as a salesman in the Boys Wear Division of the southeast region, having the same southern Florida territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time of his discharge.

10. That defendant shall provide plaintiff Kogut with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

11. That from the date of the verdict of the jury until such time as plaintiff Kogut is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

12. That plaintiffs Wilhelm and Kogut shall recover attorneys' fees of $116,624.25 to be paid to the firm of DeLaney, Millette, DeArmon and McKnight.

13. That plaintiffs Wilhelm and Kogut shall recover the costs and expenses of this action, including the expenses incurred by the law firm of DeLaney, Millette, DeArmon and McKnight, in the sum of $5,388.10.

14. That interest shall be paid on all sums now payable, at the maximum rate allowed under North Carolina law, from the date of entry of the jury's verdict.

This 3 day of July, 1984.

s/ _____
James B. McMillan
United States District
Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	ORDER GRANTING EQUITABLE RELIEF
v.	)	
BLUE BELL, INC.,	)	
Defendant.	)	

This case was tried before a jury, which on March 5, 1984, returned a verdict in favor of plaintiffs Frank E. Wilhelm and Harold L. Kogut. Plaintiffs also seek equitable relief, including reinstatement to the positions they held before the actions of defendant which culminated in their illegal discharge. Specifically, plaintiff Wilhelm seeks reinstatement to his former position as a salesman in the Boys Wear Division of defendant's southeast region; plaintiff Kogut also seeks reinstatement to his former

position as a salesman in the Boys Wear Division of defendant's southeast region.

Based upon the jury verdict, and all the evidence before the court, I find the following:

1. That age was the principal and determining factor in defendant's decision to discharge plaintiff Wilhelm from his position as a salesman with the Wrangler Boys Wear Division of defendant's southeast region on February 2, 1982, and that the discriminatory acts of defendant toward plaintiff Wilhelm were wilful, and not effected in good faith.

2. That plaintiff Wilhelm is entitled to an order granting him reinstatement to his former position with defendant.

3. That age, and retaliation for plaintiff Kogut having testified at a deposition in this case brought under the Age Discrimination in Employment Act (ADEA) were the

principal and determining factors in defendant's decision to discharge plaintiff Kogut from his position as a salesman with the Wrangler Boys Wear Division of defendant's southeast region on May 16, 1983, and that the discriminatory actions of defendant toward plaintiff Kogut were wilful, and not effected in good faith.

4. That plaintiff Kogut is entitled to an order granting him reinstatement to his former position with defendant.

Accordingly, the prayers for equitable relief are allowed as follows:

1. Defendant is enjoined to reinstate plaintiff Frank E. Wilhelm as a salesman in the Boys Wear Division of the southeast region, having the same western North Carolina territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to

the position he had at the time he was unlawfully discharged.

2. Defendant is further enjoined to provide plaintiff Wilhelm with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

3. From the date of the verdict of the jury until such time as plaintiff Wilhelm is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to

earn with reasonable di`igence, during that period.

4. Defendant shall pay $108,300.00 to plaintiff Wilhelm as liquidated damages for wilful violation of the Age Discrimination in Employment Act.

5. Defendant is enjoined to reinstate plaintiff Harold Kogut as a salesman in the Boys Wear Division of the southeast region, having the same southern Florida territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time of his discharge.

6. Defendant is further enjoined to provide plaintiff Kogut with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would

have accrued to plaintiff if he had not been illegally discharged by defendant.

7. From the date of the verdict of the jury until such time as plaintiff Kogut is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

8. Defendant shall pay $55,660.00 to plaintiff Kogut as liquidated damages for wilful violation of the ADEA.

These decisions shall be incorporated into the judgment.

IT IS SO ORDERED, this 3 day of July, 1984.

s/ _____
James B. McMillan
United States District
Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT, Plaintiffs,	)	
v.	)	ORDER AWARDING ATTORNEYS' FEES
BLUE BELL, INC., Defendant.	)	

On this date, the court entered a final judgment on the jury's verdict in favor of plaintiffs Wilhelm and Kogut, and in favor of defendant with respect to the claim of plaintiff Gatlin, in this action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. Attorneys for the plaintiffs have filed a petition for an award of attorneys' fees and costs pursuant to 29 U.S.C. §626(b) and ¶§216(b). As prevailing parties, plaintiffs Wilhelm and Kogut are entitled under these sections of the statute to a reasonable attorneys' fee.

In calculating a "reasonable attorneys' fee" the court is guided by the Supreme Court's recent decision in Blum v. Stenson, ___ U.S. ___, 52 U.S.L.W. 4337 (March 21, 1984). Pursuant to the guidelines set forth in that opinion, the court must make an initial estimate of a reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. A reasonable hourly rate is generally deemed to be the prevailing market rate for the services rendered; the burden is on the fee applicant to produce evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. ___ U.S. ___, 52 U.S.L.W. at 4379, n.11.

The court, in its discretion, may consider a number of factors in determining a reasonable hourly rate, including the

experience and special skills of the attorney, the quality of representation, the novelty and complexity of issues, and the results obtained in the action. ___ U.S. ___, 52 U.S.L.W. at 4380. This court will also consider the factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), as adopted by the Fourth Circuit in Barber v. Kimbrell's Inc., 577 F.2d 216 (4th Cir.), cert. den., 439 U.S. 934 (1978), and Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981). See also, Hensley v. Eckerhart, ___ U.S. ___, 51 U.S.L.W. 4552 (May 16, 1983).

Counsel for the plaintiffs have submitted affidavits showing that Mr. Samuel M. Millette spent 905.8 hours working on this case; Mr. Ernest S. DeLaney, III, spent 329.3 hours working on this case; and Mr. Timothy G. Sellers spent 9.8 hours working on this case. Mr. Millette and Mr. DeLaney have each

claimed an hourly rate of $125.00; Mr. Sellers has claimed an hourly rate of $85.00.

In determining the reasonableness of the hours claimed and the requested rates, the court has considered the following:

1. The special skill, experience and reputation of counsel. -- Mr. Millette has practiced law in North Carolina since 1951, and is widely experienced in all levels of trial and appellate litigation. Mr. Millette may well have had more experience in the prosecution of age discrimination case than any other attorney in the State of North Carolina. Mr. Millette enjoys an excellent reputation as a highly skilled attorney.

Mr. DeLaney has been a member of the North Carolina bar for over eleven years. During that time he has had extensive experience in federal litigation of employment discrimination suits, particularly actions

brought under the ADEA. His reputation in the community is also excellent.

2. The quality of representation. -- Plaintiffs' counsel rendered a high quality of service to their clients. Counsel vigorously and successfully pursued contested matters of pretrial discovery, and compiled and organized a substantial factual record by the time of trial. The five-day trial was smooth and uninterrupted by delay, and plaintiffs' evidence was presented in an exceptionally clear and concise manner.

3. The results obtained. -- Counsel acheived excellent results for both plaintiffs Wilhelm and Kogut. The jury found that both of these plaintiffs had been discriminated against in violation of the law, and it awarded damages fully commensurate with those findings. Plaintiffs will receive not only the monetary compensation for the detriment they have suffered, but they

will also ultimately be returned to their rightful places.

Despite counsel's best efforts, plaintiff Gatlin did not prevail on his claim. Nevertheless, plaintiff Gatlin's presence in this lawsuit was significantly beneficial to the claims of plaintiffs Wilhelm and Kogut; his testimony provided valuable evidence to support the jury's finding that defendant had discriminated against Wilhelm and Kogut in violation of the ADEA.

4. The novelty and complexity of the issues. -- This case did not involve novel issues of law; however, it involved complex and hotly contested factual issued that were hard fought at every stage. Plaintiffs' counsel were required to organize an extensive and complicated factual record, based on both circumstantial and direct evidence; they did so in a manner that rendered the

case readily comprehensible to both judge and jury.

5. The preclusion of other employment by the attorneys because they handled this case. -- This factor is not significant in determining a reasonable fee in this case.

6. Time limitations imposed by the client or the circumstances. -- This factor is not significant in determining a reasonable fee in this case.

7. The undesirability of the case within the legal community. -- This factor is not significant in determing a reasonable fee in this case.

8. The nature and length of the professional relationship. -- This factor is not significant in determing a reasonable fee in this case.

9. Time and labor expended. -- Plaintiffs' counsel, among them, devoted 1,244.9 hours to this case. The court finds that

the time and labor expended by counsel was reasonable and fully commensurate with both the seriousness of the case and the level of their ability.

Plaintiff Gatlin did not prevail on his claim and, therefore, most of the hours expended on his behalf will not be included in the award. The court will not reduce the number of compensable hours by one-third, however, because the time spent by counsel preparing plaintiff Gatlin's case was necessarily beneficial to plaintiffs Wilhelm and Kogut, in that there was a substantial overlap of facts relevant to all three cases. Therefore, the court will reduce the compensable hours claimed by plaintiffs' counsel by twenty-five percent. The resulting compensable hours are as follows:

Mr. Millette: 905.8 hours minus 226.45 (25% x 905.8) = 679.35 hours.

Mr. DeLaney: 3239.3 hours minus 82.325 (25% x 329.3) = 246.98 hours

10. Customary fee for like work. -- The court has considered the affidavits of counsel, the supporting affidavits submitted by reputable and experienced attorneys in the community, and all of the foregoing factors, and finds that a reasonable hourly rate for Mr. Millette is $125.00 and for Mr. DeLaney is $125.00, and for Mr. Timothy G. Sellers is $85.00.

Accordingly, the court has calculated its initial estimate of a reasonable fee in the following manner:

Mr. Samuel M. Millette 679.35 hours x $125.00 per hour =	$ 84,918.75
Mr. Ernest S. DeLaney, III 246.98 hours x. $125.00 per hour =	30,872.50
Mr. Timothy G. Sellers 9.8 hours x $85.00 per hour =	833.00
Total:	$116,624.25

In addition to fees, plaintiffs are entitled to recover costs and expenses related to the litigation. Plaintiffs' counsel have submitted affidavits setting forth the following expenses paid or incurred during the course of the action:

1. Filing fees, other cost of court and witness fees	$ 488.10
2. Expenses of depositions	5,591.91
3. Federal Express and express mail expenses	59.85
4. Preparation of poster exhibits and payment to Blakeney, Alexander & Machen for copying expense of personnel files	265.95
5. Xerox and other copying expenses	237.38
6. Telephone expense	540.95
Total:	$7,184.14

These costs and expenses are entirely reasonable and are fully compensable under

the ADEA. Cf. Wheeler v. Durham City Board of Education, 585 F.2d 618, 623-24 (4th Cir. 1978); however, consistent with the fee award, the court will reduce the amount awarded to cover expenses by twenty-five percent, or $1,796.04.

Subtracting $1,796.04 from $7,184.14, the court finds that plaintiffs are entitled to receive from defendant $5,388.10 as reasonable costs and expenses of litigation.

IT IS THEREFORE ORDERED that defendant pay to counsel for plaintiffs the following sums:

Attorneys' fees	$116,624.25
Costs and expenses	5,388.10
Total:	$122,012.35

This 3 day of July, 1984.

s/
James B. McMillan
United States District Judge

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FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
BLUE BELL, INC.,	)	
Defendant.	)	

This case was heard today on the various motions. It is ORDERED as follows:

1. The motion of the defendant for judgment notwithstanding the verdict as to the plaintiff Wilhelm is denied.

2. The motion of the defendant for judgment notwithstanding the verdict with respect to the plaintiff Kogut is denied.

3. Plaintiff Gatlin's motion for a judgment notwithstanding the verdict in favor of the defendant is denied.

4. Ruling is deferred on the question of attorneys' fees. Counsel for all parties

are directed to examine the recent decision of the Supreme Court, Blum versus Stinson, and consider the rearrangement of thought required by that decision in the matter of assessing attorneys fees and also to consider the sufficiency of proof which at present lacks affidavits from lawyers regarding the question of reasonableness of fees. Affidavits from both sides will be received if offered.

In further comment on the verdict:

All the verdicts are supported by adequate evidence.

The evidence in favor of plaintiffs Wilhelm and Kogut was, in my opinion, especially strong and it fully meets all of the most stringent requirements of Burdine and McDonnell-Douglas and similar cases with regard to the shifting of the burden of production of evidence and the sufficiency of the plaintiffs' case.

In their research on the question of fees, counsel are requested to advise the Court, specifically with reference to Fourth Circuit and United States Supreme Court decisions, whether they have any doubt that the Court can enter a judgment regarding fees after an appeal has been taken from a judgment on the verdict. The Court agrees that judgment on all the verdicts should be entered but does not want to proceed with that action until receipt of advice by counsel.

As soon as memoranda have been received from both sides, final action will be taken on all the matters left in suspense by this order.

The Court would like to receive from counsel anything else they wish to write not later than May 14.

This 30th day of April, 1984.

s/
James B. McMillan
United States District Judge